TA SECURITIES BHD

v.

NG YEN LING

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-575-1998]
29 JUNE 2000

CIVIL PROCEDURE: *Service - Service of writ in pursuance of contract - Clause deeming writ to be served upon expiry of three days from posting - Whether service may still be disputed by defendant - Rules of the High Court 1980, O. 10 r. 3(1)(b)*

The sole issue in the instant appeal was whether the defendant could dispute service of the writ by the plaintiff notwithstanding the fact that the defendant had signed an application form, when opening an account with the plaintiff, which included a clause to the effect that the service of any legal process by prepaid registered post sent to the defendant's address shall be deemed to have been duly served and duly received by the defendant upon the expiry of three days from posting.

Held:

[1] Order 10 r. 3(1)(b) of the Rules of the High Court 1980 provides, *inter alia*, that if the writ is served in accordance with the contract, "the writ shall … be deemed to have been duly served on the defendant". Thus, service is deemed contractually by the said clause and statutorily by O. 10 r. 3(1)(b) of the Rules of the High Court 1980. The writ in the instant case was sent by prepaid registered post to the proper address of the defendant and therefore, the deeming provisions of the said clause and of O. 10 r. 3(1)(b) of the Rules of the High Court 1980 came into operation.

[2] The court was bound by the authorities to hold that the defendant in this case was precluded from showing that she did not receive the writ. The court had to take as conclusive that the writ was served on her.

[Appeal dismissed.]

Case(s) referred to:
Amanah Merchant Bank Bhd. v Lim Tow Choon [1994] 2 CLJ 1 ***(foll)***
Canadian Imperial Bank of Commerce v. Haley [1979] 100 DLR (3d) 470 ***(refd)***
Rex v. Westminster Unions Assessment Committee, Ex parte Woodward & Sons [1917] 1 KB 832 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 10 r. 3(1)(b)

Valuation (Metropolis) Act 1869 [Eng], s. 65

For the plaintiffs - YK Lian; M/s Iza Ng Yeoh & Kit
For the defendant - S Periasamy; M/s Radzi Sheikh Ahmad, Peri & Saini

Reported by S Dharmendran

JUDGMENT

Abdul Aziz Mohamad J:

The learned senior assistant registrar has dismissed the defendant's application for the setting aside of the judgment in default of appearance entered against her in this action. The defendant now appeals.

For the present, I am to decide only the question of the service of the writ.

The plaintiffs' claim is for contra losses suffered by them in share trading carried out under the defendant's account with them. In applying to open the account, the defendant agreed with the plaintiffs, in para. 23 of the covenants and undertakings annexed to the application form, as follows:

> I/We agree that the service of any legal process which includes pleading, all forms of originating process, interlocutory application of whatever nature, affidavits, orders and such documents other than the aforesaid which are required to be served under the Rules of High Court 1980, Subordinate Court Rules 1980, Companies Act 1965, Bankruptcy Act 1967 and Debtors Act 1957 and the rules made thereunder by prepaid registered post sent to the address as given by me/us in the application form or the new address as provided in paragraph 22 and shall be deemed to have been duly served and duly received by me/us upon the expiry of three (3) days after the same is effected.

That paragraph provides for service "of any legal process" by "prepaid registered post" sent to the defendant's address and it provides that the legal process "shall be deemed to have been duly served and duly received" by the defendant "upon the expiry of three (3) days after the same" – which I take to mean the posting – "is effected".

The legal process intended by the paragraph is expressed to include documents "which are required to be served" under the Rules and Acts specified. There are two groups of such documents. The first group consists of named documents, namely, pleadings, all forms of originating process, interlocutory applications, affidavits and orders. They would include the writ in this case, which is an originating process.

I need to mention the second group in order to dispose of an argument advanced by learned counsel for the defendant. The second group is of unnamed documents generalized as "such documents". But the second group is qualified by the words "other than the aforesaid". The qualification means that the second group does not include the first group, and that is so because the first group, which includes a writ, is already included. The phrase is merely a piece of drafting fastidiousness inserted to avoid the unnecessary inclusion in the second group of documents already included in the first group. It does not, as counsel argued, have the effect of excluding the first group, including the writ, from the paragraph. If that had been the intention, the first group would not have been included in the first place.

Paragraph 23, then, as well applies to a writ and any other originating process as it applies to other documents required to be served under the specified Rules and Acts which are not an originating process.

Here then is a case of a contract which specifies the manner in which the process by which an action in respect of the contract is begun may be served on the defendant. The manner specified is by prepaid registered post to the defendant's address coupled with the deeming of service upon the expiry of three days. The case falls under O. 10 r. 3(1)(b) which provides, *inter alia*, that if the writ is served in accordance with the contract "the writ shall ... be deemed to have been duly served on the defendant". There are here two deemings of service, one contractual in para. 23, the other statutory in O. 10 r. 3(1)(b). The latter endorses the former.

It is not in dispute that the writ in this case was sent by prepaid registered post to the proper address of the defendant and that the deeming of para. 23 and of O. 10 r. 3(1)(b) came into operation. The defendant, however, claims that she did not receive the writ and her counsel, contending that the deeming is rebuttable, argued that, although it is not possible for the defendant to prove non-receipt of the writ, the conduct of the defendant has been consistent with her not having received the writ and therefore her claim of not receiving the writ should be accepted as cogent and credible.

In *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1, the Supreme Court considered a clause in a guarantee providing for the service of notices but not of an originating process. The notice in that case was a notice of demand which was necessary to found a cause of action against the guarantor. The clause was similar in nature to para. 23 in this case and contained a "shall be deemed to be served" provision. The Supreme Court held, at p. 5, that the words "shall be deemed" in the clause before them meant "shall be regarded as", meaning that the deeming was not meant to be a presumption and was therefore not something that was rebuttable.

The Supreme Court arrived at that opinion after considering two cases which obviously they approved.

The first case was *Canadian Imperial Bank of Commerce v. Haley* [1979] 100 DLR (3d) 470, which also considered a clause in a guarantee about the making on the guarantor of a demand which was necessary for giving rise to a cause of action against him. The clause provided for making the demand by post and also contained a "shall be deemed" provision. The New Brunswick Supreme Court, Appeal Division, held that the words "shall be deemed" were the equivalent of "shall be regarded as" and the fact that the defendant did not actually receive the demand was immaterial.

That case and the Supreme Court decision concerned a contractual clause and the interpretation of the "deeming" provision should apply to para. 23 in this case. As I said, the clause in those cases concerned or was applied to the service of a notice of demand whereas the paragraph in the present case is applicable to a writ, and I do feel concerned about the effect of the interpretation of the words "shall be deemed" in the case of a notice of demand as contrasted with the case of a writ. The effect is that even if the defendant in fact did not receive the notice of demand or the writ she will not be allowed to prove it, but in the case of a notice of demand the consequence is that the cause of action would have arisen against her but she still will be able to defend the action, whereas in the case of a writ the consequence is that judgment will have been entered against her and she will not be able to set it aside solely on grounds of non-service. Nevertheless, I cannot see how the distinction in the effect can justify a difference in interpretation of the words "shall be deemed" according to whether it is a notice or a writ that is concerned. The difficulty of making the distinction will be obvious were there to be a similar contractual clause concerning both service of originating processes and notices of demand.

The other case considered by the Supreme Court was *Rex v. Westminster Unions Assessment Committee, Ex parte Woodward & Sons* [1917] 1 KB 832, which concerned s. 65 of the Valuation (Metropolis) Act 1869, which provided for the service of orders, notices and documents under the Act. Included was service by post, with the usual "shall be deemed" clause. Although the wording of the section is different from O. 10 r. 3(1)(b), its effect is the same. The court in that case held in effect that proof of posting as provided by the section was conclusive proof of service, meaning that it would not be open to the person concerned to show that he did not receive the notice. There is no reason for not applying the decision in that case, which the Supreme Court regarded with approval, to the deeming provision of O. 10 r. 3(1)(b).

I feel bound by the authorities to hold that the defendant in this case is precluded from showing that she did not receive the writ. I have to take it as conclusive that the writ was served on her. It is therefore not necessary for me to consider the conduct of the defendant that her counsel would rely on for persuading the court to accept that she did not receive the writ.